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INC., L'ORÉAL USA PRODUCTS, INC.,
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AVENUE NYC, LLC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE SUBPOENAS *DUCES TECUM*
AND TO TESTIFY AT DEPOSITION
TO COSWAY CO.

LIQWD, INC. and OLAPLEX LLC,

Plaintiffs,

vs.

L'ORÉAL USA, INC., L'ORÉAL USA
PRODUCTS, INC., L'ORÉAL USA
S/D, INC. and REDKEN 5TH AVENUE
NYC, LLC,

Defendants.

CASE NO. 2:19-mc-00015

Underlying Litigation
Civil Action No. 17-14-JFB-SRF
United States District Court
District of Delaware

Third-Party Discovery Cutoff:
January 25, 2019
Pretrial Conference: June 4, 2019
Trial: July 29, 2019

[DISCOVERY MATTER]

**SUPPLEMENTAL
MEMORANDUM IN SUPPORT
OF DEFENDANTS' MOTION TO
COMPEL NON-PARTY
COSWAY CO. TO COMPLY
WITH SUBPOENA *DUCES
TECUM* AND TO TESTIFY AT
DEPOSITION**

Date: February 28, 2019
Time: 1:30 p.m.
Dept.: 790
Judge: Hon. Patrick J. Walsh

[Declaration of Serli Polatoglu filed
and served concurrently herewith]

1 L'Oréal USA, Inc., L'Oréal USA Products, Inc., L'Oréal USA S/D, Inc., and
 2 Redken 5th Avenue NYC, LLC (together, "L'Oréal USA") submit this
 3 supplemental memorandum to briefly address some of the arguments raised by
 4 Cosway Co. ("Cosway") in the Joint Stipulation regarding L'Oréal USA's Motion
 5 to Compel Cosway to Comply with Subpoena *Duces Tecum* and to Testify at
 6 Deposition (the "Subpoena"). None of Cosway's arguments excuse its failure to
 7 comply with the Subpoena served by L'Oréal USA in *Liqwd, Inc. v. L'Oréal USA,*
 8 *Inc.*, Civil Action No. 17-14-JFB-SRF (the "Underlying Action") on December 3,
 9 2018—*over three months ago*.¹ As such, Cosway should be ordered to promptly
 10 comply with the Subpoena.

11 L'Oréal USA has been forced to file several motions to compel against third
 12 parties affiliated with Plaintiffs Liqwd, Inc. and Olaplex LLC (together, "Olaplex"),
 13 who have refused to comply with subpoenas. In particular, Cosway manufactures
 14 products for Olaplex. L'Oréal USA seeks information from Cosway regarding the
 15 composition of Olaplex's products, as this information bears on L'Oréal USA's
 16 defenses to Olaplex's patent infringement claims. (*See* Dkt. No. 3 at 6.)

17 Cosway refused to initially respond to the Subpoena, and now takes the
 18 position that it need not comply because L'Oréal USA is "no longer authorized to
 19 conduct third party discovery in the underlying action." (Dkt. No. 3 at 4.) Even
 20 further, in its Supplemental Memorandum filed today Cosway states: "Cosway
 21 understands that the District Court for the District of Delaware considered

22
 23 ¹ Cosway's assertion that L'Oréal USA is at fault for serving the Subpoena "just
 24 seventeen days prior to the noticed December 20, 2018" date is unavailing. L'Oréal
 25 USA's service of the Subpoena was timely under both the Scheduling Order
 26 governing the Underlying Action and the Federal Rules of Civil Procedure. (Dkt.
 27 No. 3-1, Ex. A, ¶ 3.) If Cosway felt it was not accorded adequate time to comply
 28 with the Subpoena, it should have moved to quash the same. Fed. R. Civ. P.
 45(d)(3). By failing to do so, it has waived this argument. In any event, Cosway
 has had over three months to comply with the Subpoena, and has still refused to do
 so.

1 L'Oréal's request for a second reopen [sic] third party discovery in the underlying
2 matter and declined that request on February 14, 2019." (Dkt. No. 27 at 1.)
3 Cosway is seriously misinformed.

4 On December 12, 2018, the Court suggested that it would be willing to
5 extend the third party discovery deadline if third parties were relying on the
6 deadline to not comply. (*See* Declaration of Serli Polatoglu ("Polatoglu Decl.")
7 filed concurrently herewith, Ex. A at 164:19-166:15 (holding that, because certain
8 third-party witnesses were "rely[ing] on the discovery cut-off as a sword[,] . . . it
9 would be quite appropriate for the Court to issue an order extending the discovery
10 cut-off to get those witness in").) Then, on January 14, 2019, the Court extended
11 the third-party discovery deadline from December 21, 2018 to January 25, 2019.
12 (Dkt. No. 3-1, Ex. K.)

13 Then, just today, the Court made clear that any subpoenas served prior to the
14 original discovery cutoff date of December 21, 2018 could be enforced by the
15 courts in which the third parties reside, notwithstanding the discovery cutoff date.
16 In particular, during a discovery teleconference held in the Underlying Action,
17 L'Oréal USA informed the Court that it was not seeking to extend any discovery
18 deadlines any further, but that certain third parties have objected to discovery on the
19 grounds that the discovery cut-off had passed. (*See* Polatoglu Decl., ¶ 4.) The
20 Court made clear that, if a subpoena was served prior to the original discovery cut-
21 off date (December 21, 2018), then those third parties must comply with any
22 discovery order relating to that subpoena. (*Id.*) As an example, the Court
23 referenced the fact that the Northern District of Illinois just opened discovery for
24 the limited purpose of allowing L'Oréal USA to depose a third party, Vicki Laris,
25 who had similarly objected to her deposition on grounds that the discovery cutoff
26 had lapsed. (*See* Polatoglu Decl., ¶ 4 and Ex. C at 6:9-15). It is not true that the
27 Court denied a "request for a second reopen [sic] third party discovery" (Dkt. No.
28 27 at 1), as no such request was ever made. Rather, the Court encouraged L'Oréal

1 USA to pursue discovery of the third parties through the appropriate courts, and
 2 urged the parties to attempt to resolve third party discovery issues informally. (*See*
 3 Polatoglu Decl., ¶ 4.) Unfortunately, Olaplex has refused to cooperate in this
 4 regard, and instead has provided misinformation to Cosway in its attempt to block
 5 this discovery at any cost. (*Id.*) Cosway was served with the subpoena on
 6 December 3, 2018, well before the discovery cut-off. As one court has already
 7 done (Polatoglu Decl., Ex. B), and as the court in the Underlying Action expressed,
 8 this Court can issue an order opening discovery for the limited purpose of having
 9 Cosway comply with the Subpoena.

10 Such an order is warranted here. Cosway concedes that it did not timely
 11 serve its objections to the Subpoena, but asserts that this Court should consider
 12 them anyway, contending that it did not have sufficient time to comply with the
 13 Subpoena, and that the Subpoena was overbroad and unduly burdensome. (Dkt.
 14 No. 3 at 15.) But Cosway has not articulated any undue burden imposed by the
 15 Subpoena. Moreover, the requests and topics identified therein are narrowly
 16 tailored, and L'Oréal USA accorded Cosway sufficient time to comply with the
 17 Subpoena under the Federal Rules, as it set the compliance date for the subpoena as
 18 December 20, 2018. *See* Fed. R. Civ. P. 45. The mere fact that a subpoena
 19 imposes a burden on a third party does not excuse non-compliance. The relevant
 20 inquiry is not whether discovery will impose a burden, but whether it imposes an
 21 undue burden. Fed. R. Civ. P. 45(d)(1). As the Northern District of Illinois
 22 explained when it ordered Ms. Laris to comply with her subpoena:

23 Compliance with discovery is a nuisance. I agree. And
 24 it's complicated. And when you're a third party, it just
 25 seems like it's not fair. **But the rule of law is really**
 26 **important in the United States**, and it's really important
 27 to me. **And that means that, even though it's**
 28 **inconvenient or difficult or annoying, when you get a**
subpoena or your testimony is necessary for due
process, you cooperate because we live in a free society
 because we all comply with the rules.

1 (Polatoglu Decl., Ex. C at 5:24-6:8 (emphasis added).)

2 Cosway also maintains that Request for Production Nos. 3 and 4, which seek
 3 all invoices in Cosway's possession relating to the Olaplex Products (*see* Dkt. No. 3
 4 at 13), are improper, because L'Oréal USA has "offer[ed] no evidence or
 5 explanation" to support its contention that those invoices would identify the
 6 ingredients of the Olaplex Products. (*Id.*) Had Cosway made any effort to discuss
 7 the Subpoena with L'Oréal USA rather than just ignore it, L'Oréal USA would
 8 have explained that invoices produced by another manufacturer of the Olaplex
 9 products, Gelest, Inc., identifies certain ingredients in the Olaplex products. To the
 10 extent Cosway sources ingredients from other vendors for the Olaplex products,
 11 invoices from those vendors would identify these ingredients. Moreover, in
 12 arguing that it does not have any relevant information because it does not
 13 manufacture the Olaplex No. 1 product (Dkt. No. 27 at 3), Cosway ignores the fact
 14 that the Court in the Underlying Action recently granted Olaplex's Motion for
 15 Leave to file a Third Amended Complaint, which added the Step 2 and Step 3
 16 products to the case. Cosway does not dispute that it manufactures the Step 2 and
 17 Step 3 products for Olaplex, and Olaplex has made this representation as well.
 18 (*See, e.g.*, Dkt. No. 3-1, Ex. B at 6:4-12.) Moreover, Olaplex has conceded that
 19 Cosway is involved in manufacturing its Step 1 product. (*See* Dkt. No. 3-1, Ex. C
 20 at 12.) Cosway's work on the Olaplex products is relevant to L'Oréal USA's
 21 defenses of noninfringement and invalidity, particularly because Olaplex has taken
 22 the position that it does not know how its products are made.² (*See, e.g.*, Dkt. No.
 23 3-1, Ex. C at 12.) In any event, this Court should not consider this argument, as
 24 Cosway did not timely serve objections to the Subpoena, thereby waiving all
 25 objections thereto. *See McCoy v. Sw. Airlines Co.*, 211 F.R.D. 381, 385 (C.D. Cal.

26 _____
 27 ² As such, Cosway's argument that it should not have to comply with the Subpoena
 28 because Olaplex has already produced relevant information is unavailing. (*See* Dkt.
 No. 27 at 4.)

1 2002).

2 Finally, Cosway's request to shift the cost of compliance with the Subpoena
 3 onto L'Oréal USA should be denied. Cosway has not demonstrated an inability to
 4 bear the costs associated with compliance of the Subpoena. Its bare assertion that
 5 L'Oréal USA should bear the costs of compliance because it is "a subsidiary of
 6 L'Oréal S.A., a worldwide enterprise," is insufficient, and directly at odds with this
 7 Court's mandatory duty to impose sanctions on Cosway for failing to make *any*
 8 effort to comply with the Subpoena since its issuance over three months ago. (D.I.
 9 3 at 15.) *See* Fed. R. Civ. P. 37(a)(5)(A). As the Illinois court noted in granting a
 10 similar motion yesterday, "the rule of law is really important in the United States"
 11 and "when you get a subpoena or your testimony is necessary for due process, you
 12 cooperate." (Polatoglu Decl., Ex. C a 6:2-8.) This Court should order Cosway to
 13 comply with the Subpoena promptly, and award L'Oréal USA \$5,000, which is
 14 only a portion of its fees and costs, for having to bring this motion. (Polatoglu
 15 Decl., ¶ 5.)

16
 17 DATED: February 14, 2019

PAUL HASTINGS LLP

18 By: /s/
 19 Katherine F. Murray

20 Attorneys for Defendants
 21 L'ORÉAL USA, INC., L'ORÉAL USA
 22 PRODUCTS, INC., L'ORÉAL USA
 23 S/D, INC. and REDKEN 5TH AVENUE
 24 NYC, LLC
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 26
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